

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 869 w/CS    Adjudication of Guilt  
**SPONSOR(S):** Gelber  
**TIED BILLS:** None                      **IDEN./SIM. BILLS:** SB 2552

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice (Sub.)	7 Y, 0 N	Kramer	De La Paz
2) Public Safety & Crime Prevention	19 Y, 0 N w/CS	Kramer	De La Paz
3) Judiciary	18 Y, 0 N w/CS	Jaroslav	Havlicak
4)			
5)			

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### SUMMARY ANALYSIS

This bill prohibits withholding of adjudication for a felony offense in certain circumstances as follows:

- First Degree Felony: This bill provides that a court may not withhold adjudication of guilt upon a defendant for a capital, life or first degree felony offense.
- Second Degree Felony: This bill provides that a court may not withhold adjudication of guilt upon a defendant for a second degree felony offense unless the state attorney requests in writing that adjudication be withheld or the judge makes written findings that the withhold of adjudication is reasonably justified based on certain factors. This bill prohibits a withhold of adjudication of guilt for a second degree felony offense if the defendant has a prior withhold of adjudication for a felony that did not arise from the same transaction as the current felony offense.
- Third Degree Felony: This bill provides that a court may not withhold adjudication of guilt for a third degree felony offense if the defendant has a prior withhold of adjudication for a felony offense that did not arise from the same transaction as the current felony offense unless the state attorney requests that adjudication be withheld in writing or the judge makes the written findings described above. This bill prohibits a withhold of adjudication if the defendant has two or more prior withholds of adjudication for felony offenses that did not arise from the same transaction as the current felony offense.

This bill also repeals Florida Rule of Criminal Procedure 3.670 to the extent that the procedural rule is inconsistent with this bill's provisions. This repeal will take effect only if this bill is passed by a 2/3 vote of each house of the Legislature.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0869c.ju.doc  
**DATE:** March 16, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |   |                             |   |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 5. Empower families?                 | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

When a defendant is found guilty after a trial or pleads guilty or *nolo contendere*, a judge is permitted to withhold the judgment of guilt for the offense. This is known as a withhold of adjudication. Section 948.01(2), F.S., provides that if it appears to a judge that a defendant is “not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by the law”, the judge may withhold the adjudication of guilt and place the defendant on probation. Florida Rule of Criminal Procedure 3.670 provides that if a defendant is found guilty, a judgment of guilt shall be rendered in open court and in writing, signed by the judge, filed and recorded. The rule further provides that a judge may withhold adjudication of guilt if the judge places the defendant on probation.

During January of 2004, the *Miami Herald* published a series of articles<sup>1</sup> relating to withholds of adjudication. According to the newspaper’s review of Florida felony cases between 1993 and 2002, nearly 17,000 defendants received more than one withhold of adjudication<sup>2</sup>. The series of articles documented the details of a number of instances in which offenders received repeated withholds of adjudication. The newspaper claimed to have found more than 67,000 new crimes committed by offenders who had adjudication withheld for their first conviction.<sup>3</sup> According to the articles, withholds of adjudication are often used as a tool in plea bargaining a case.

The Bureau of Research and Data Analysis of the Department of Corrections reports the following:

[A]s of December 31, 2003, there were 60,091 offenders (out of 152,343) on supervision that had adjudication withheld. Of these, 9,768 had adjudication withheld on more than three (3) different felony convictions.<sup>4</sup>

In Florida, a felony conviction impacts a person’s civil rights such as the right to vote<sup>5</sup> and to possess a firearm. However, if adjudication of guilt is withheld, these rights are not suspended.<sup>6</sup>

<sup>1</sup> More than a dozen articles were published as a four-part feature series January 25-28, 2004, available on file with the House Committee on Judiciary.

<sup>2</sup> See Manny Garcia and Jason Grotto, “A second chance turns into many”, MIAMI HERALD, January 27, 2004, 1A.

<sup>3</sup> See *id.*

<sup>4</sup> Department of Corrections, Bill Analysis of HB 869 (2004), 3.

<sup>5</sup> See Art. VI, s. 4, Fla. Const.; s. 97.041, F.S.

The Florida Supreme Court has noted that “although an adjudication of guilt is generally required for there to be a ‘conviction,’ that term as used in Florida law is a ‘chameleon-like term that has drawn its meaning from the particular statutory context in which the term is used.’”<sup>7</sup> For example, under the Florida Evidence Code, evidence of a prior felony conviction can be used to attack the credibility of a witness.<sup>8</sup> The Florida Supreme Court has held that this evidence cannot be used if adjudication was withheld for the prior conviction.<sup>9</sup> Conversely, in *McCrae v. State*,<sup>10</sup> the court held that a guilty plea or verdict with a withhold of adjudication constituted a conviction which could be considered an aggravating circumstance in a capital sentencing proceeding. Further, in *Raulerson v. State*,<sup>11</sup> the Florida Supreme Court considered the issue of whether the term “conviction” as used in the statute that provides for increased sanctions for a third conviction of driving with a suspended license, includes offenses for which adjudication was withheld. After examining the statutory language and legislative history, the court determined that in that context, the term included offenses for which adjudication was withheld.

There are already a number of offenses in current law for which a judge is statutorily prohibited from withholding adjudication of guilt, including the offenses of DUI manslaughter, assault or battery on a law enforcement officer and drug trafficking.<sup>12</sup>

### Proposed Changes

This bill creates a new Section 775.08435, F.S., which places restrictions on withholds of adjudication as follows:

- *First Degree Felony*: This bill provides that a court may not withhold adjudication of guilt upon a defendant for a capital, life or first degree felony offense.
- *Second Degree Felony*: This bill provides that a court may not withhold adjudication of guilt upon a defendant for a second degree felony offense unless the state attorney requests in writing that adjudication be withheld or the court makes findings that the withhold of adjudication is reasonably justified based on circumstances or factors in accordance with the factors considered by a judge in imposing a downward departure sentence contained in s. 921.0026, F.S.<sup>13</sup> This bill prohibits a withhold of adjudication of guilt for an second degree felony offense if

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<sup>6</sup> In *Snyder v. State*, 673 So.2d 9 (Fla. 1996), the defendant claimed that the statute making it unlawful for a convicted felon to possess a firearm, s. 790.23, F.S., did not apply to a conviction that was on appeal. The Florida Supreme Court held that a defendant is “convicted” when adjudicated guilty.

<sup>7</sup> *State v. McFadden*, 772 So.2d 1209, 1215 (Fla. 2000)(citations omitted).

<sup>8</sup> See s. 90.610(1), F.S.

<sup>9</sup> See *McFadden*.

<sup>10</sup> 395 So.2d 1145 (Fla. 1980)

<sup>11</sup> 763 So.2d 285 (Fla. 2000).

<sup>12</sup> See ss. 316.656, 784.07 and 893.135(3), F.S. Other offenses for which a judge is prohibited from withholding adjudication include: boating under the influence which results in manslaughter, see s. 327.36, F.S.; offenses for which a minimum mandatory term of imprisonment must be imposed under “10-20-Life,” see s. 775.087, F.S.; offenses relating to weapons of mass destruction, see ss. 790.163, 790.164, 790.165 and 790.166, F.S.; bookmaking, see s. 849.25, F.S.; and assault or battery on a person over the age of 65, see s. 784.08, F.S.

<sup>13</sup> According to s. 921.0026(1), F.S. downward departure from the lowest permissible sentence is prohibited unless “there are circumstances or factors that reasonably justify the downward departure.” In other words, a judge is not permitted to impose a sentence below the lowest permissible sentence unless the judge makes specific findings justifying the downward departure. Section 921.0026, F.S., contains a list of mitigating factors which can justify a departure sentence including the following:

- (a) The departure results from a legitimate, uncoerced plea bargain.
- (b) The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- (c) The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.

the defendant has a prior withhold of adjudication for a felony that did not arise from the same transaction as the current felony offense.

- *Third Degree Felony:* This bill provides that a court may not withhold adjudication of guilt for a third degree felony if the defendant has a prior withhold of adjudication for a felony offense that did not arise from the same transaction as the current felony offense. This bill would prohibit a withhold of adjudication if the defendant has two or more prior withholds of adjudication for felony offenses that did not arise from the same transaction as the current felony offense.

This bill also repeals Florida Rule of Criminal Procedure 3.670 to the extent that it is inconsistent with the provisions of the bill. The repeal of the rule of procedure will take effect only if this bill passes by a 2/3 vote of each house of the Legislature.

#### C. SECTION DIRECTORY:

**Section 1.** Creates s. 775.08435, F.S.; prohibits withhold of adjudication of guilt under certain circumstances.

**Section 2.** Repeals Florida Rule of Criminal Procedure 3.670 to the extent that it is inconsistent with the provisions of this bill.

**Section 3.** Provides an effective date of July 1, 2004, except that the repeal of Florida Rule of Criminal Procedure 3.670, shall take effect only if this bill is passed by an affirmative vote of two-thirds of each house of the Legislature.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

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- (d) The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.
  - (e) The need for payment of restitution to the victim outweighs the need for a prison sentence.
  - (f) The victim was an initiator, willing participant, aggressor, or provoker of the incident.
  - (g) The defendant acted under extreme duress or under the domination of another person.
  - (h) Before the identity of the defendant was determined, the victim was substantially compensated.
  - (i) The defendant cooperated with the state to resolve the current offense or any other offense.
  - (j) The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.
  - (k) At the time of the offense the defendant was too young to appreciate the consequences of the offense.
  - (l) The defendant is to be sentenced as a youthful offender.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

*Staff of the House Committee on Judiciary writes:*

**Separation of Powers: Substance vs. Procedure**

Article V, section 2(a) of the Florida Constitution provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts." This bill's requirement that courts not withhold adjudication in certain cases may raise concerns under this provision.

Florida courts protect their rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Florida Supreme Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.<sup>14</sup> In 1991, the court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaims was unconstitutional because it conflicted with an existing rule of civil procedure.<sup>15</sup>

Essentially, the rule is that substance is legislative and procedure is judicial. In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure in this way:

The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of

<sup>14</sup> See *In re Connors*, 332 So.2d 336 (Fla. 1976).

<sup>15</sup> See *Haven Federal Savings & Loan Assn. v. Kirian*, 579 So.2d 730 (Fla. 1991).

individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.<sup>16</sup>

This "twilight zone" remains to this day, and causes in the analysis of many enactments a difficult determination of whether a matter is procedural or substantive.

It appears that the closer to criminal law one gets, the more likely it is that the courts will treat something as substantive rather than procedural. For example, in the administrative context of worker's compensation, Florida courts have consistently held that burdens of proof are procedural rather than substantive,<sup>17</sup> but at the opposite extreme, in the criminal context, the Supreme Court of the United States has held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires proof of a defendant's guilt beyond a reasonable doubt; moreover, this requirement applies to juvenile proceedings even if they are technically "civil."<sup>18</sup> To further illustrate this, the Florida Supreme Court has held that criminal statutes of limitations are substantive,<sup>19</sup> but strongly suggested that civil statutes of limitations are procedural.<sup>20</sup> It is therefore possible that a court might determine this bill's prohibition on withholding adjudication to be either substantive or procedural. Even if this bill passes by the constitutionally-required 2/3 margin for repealing court rules of procedure,<sup>21</sup> it is still possible that a court would regard that prohibition as procedural and strike it down.

However, even if a court held that the prohibition is procedural, that court also still might not strike it down. Despite treating it as procedural, the Florida Supreme Court in *Kalway v. Singletary*<sup>22</sup> nonetheless upheld a thirty-day statute of limitations for the filing of an action challenging a prisoner disciplinary proceeding. In discussing the separation of powers issue, the Court said:

As a practical matter, the Court on occasion has deferred to the expertise of the legislature in implementing its rules of procedure. See, e.g., *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So.2d 195, 195 (Fla.1996) (noting that the need for juvenile detention shall be made "according to the criteria provided by law" and explaining that these "include those requirements set out in section 39.042, Florida Statutes (1995)"); *In re Family Law Rules of Procedure*, 663 So.2d 1049, 1086 (Fla.1995) (setting forth amended rule 12.740, which provides that all contested family matters may be referred to mediation, "[e]xcept as provided by law"). The setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts.<sup>23</sup>

Thus, even if a court were to treat this bill's provisions as procedural, it could certainly still defer to the Legislature's primary role in establishing criminal laws and the punishments for violating them.

#### B. RULE-MAKING AUTHORITY:

None.

<sup>16</sup> *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

<sup>17</sup> See *Sullivan v. Mayo*, 121 So.2d 424 (Fla. 1960); 57 FLA. JUR. 2d WORKERS' COMPENSATION § 12 and authorities cited therein.

<sup>18</sup> See *In re Winship*, 397 U.S. 358 (1970).

<sup>19</sup> See *Rubin v. State*, 390 So.2d 322 (Fla. 1980).

<sup>20</sup> See *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998).

<sup>21</sup> See Art. V, s. 2(a), Fla. Const.

<sup>22</sup> 708 So.2d 267 (Fla. 1998).

<sup>23</sup> *Id.* at 269.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

Because, in listing circumstances under which adjudication cannot be withheld, this bill does not use “and” or “or,” it may be unclear under this bill whether a court can repeatedly withhold adjudication for second- or third-degree felonies on the written request of the state attorney. Since this potential ambiguity may invite multiple interpretations, a court could apply the rule of lenity in favor of a defendant to hold that such a request from the state attorney may authorize an indefinite number of withholds for second- or third-degree felonies.<sup>24</sup>

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

This bill, as originally filed, prohibited a court from withholding adjudication of guilt upon a defendant for any felony offense if the defendant had a prior withhold of adjudication for a felony that did not arise out of the same transaction as the current felony. The bill provided an exception for cases in which the prior withhold was more than 5 years prior to the date of the commission of the current felony offense, the defendant has not been adjudicated guilty of any felony since the prior withhold of adjudication and the state attorney requests that adjudication be withheld or the court makes written findings setting forth specific facts supporting its conclusion that failure to withhold adjudication would cause manifest injustice. The original bill also prohibited a court from withholding adjudication for a felony if the defendant had two or more prior withholds of adjudication for felony offenses that did not arise from the same transaction as the current felony offense.

On March 3, 2004, the House Subcommittee on Criminal Justice recommended the adoption of a strike-all amendment essentially containing the provisions described in this analysis, although not in identical form.

On March 5, 2004, the House Committee on Public Safety & Crime Prevention adopted its subcommittee’s recommended amendment and reported this bill favorably with a committee substitute.

On March 15, 2004, the House Committee on Judiciary adopted one amendment to this bill. The amendment clarifies the language of the bill to make clear that neither a request from the state attorney nor written findings by a court may authorize a second withhold of adjudication for a second-degree felony or a third withhold of adjudication for a third-degree felony. The Committee then reported this bill favorably with a committee substitute.

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<sup>24</sup> The rule of lenity requires that courts construe a criminal statute strictly, such that where the statute is “susceptible of differing constructions, it shall be construed most favorably to the accused.” *Cabal v. State*, 678 So.2d 315, 318 (Fla. 1996). Unlike some states, Florida has also adopted the rule of lenity by statute. See s. 775.021(1), F.S.